

JAN WRONCY

IBLA 93-528      Decided July 30, 1996

Appeal of response to a protest of the purchase of Deer Away Big Game Repellant by the Eugene, Oregon, District Office, Bureau of Land Management, prior to the close of the public comment period for related environmental assessments.

Appeal dismissed.

1. Appeals—Rules of Practice: Appeals: Dismissal

A protest filed with BLM with respect to an action which has already been completed is properly dismissed as untimely since a protest, by definition, relates to an action proposed to be taken.

APPEARANCES: Jan Wroncy, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On April 27, 1993, Jan Wroncy sent a letter to the District Manager, Eugene (Oregon) District, Bureau of Land Management (BLM), protesting BLM's purchase of Deer Away Big Game Repellant (BGR) prior to the close of the public comment period for three environmental assessments (EA's) proposing the use of BGR 1/ in BLM timber management. 2/ In her letter of April 27, 1993, appellant asserted that the purchase of BGR prior to the close of the public comment period violates the National Environmental Policy Act 3/ by denying a meaningful opportunity for public participation prior to commitment of funds.

By letter dated May 14, 1993, the BLM District Manager responded to appellant's letter of April 27, 1993, stating that BLM's purchase of BGR reflected the agency's annual maintenance plans for new seedlings

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1/ BGR, according to the EA's is a repellant made up of 5 percent putrescent egg solids and 95 percent inert ingredients (emulsion, water, white mineral oil, and emulsifiers). Deer and elk find BGR repugnant and will avoid browsing on the buds and new growth of conifer seedlings sprayed with BGR.

2/ The EA's were identified as South Valley Resource Area (EA No. ORO-090-93-3), Coast Range Resource Area (EA No. ORO-90-93-4), and McKenzie Resource Area (EA No. ORO-90-93-5).

3/ 42 U.S.C. § 4332 (1994).

and was not related to the specific action proposed in the three EA's regarding application of BGR to specified areas of public land. More significantly, the District Manager indicated that BLM had made a decision to stop the use of BGR pending further study of the ingredients of the BGR and the potential exposure hazards to personnel applying the substance. <sup>4/</sup> The record also contains a photocopy of an article published April 8, 1993, in the Eugene Register Guard, stating that the Eugene District of BLM announced plans to cancel its BGR spray program for 1993 because of uncertainties regarding the effect of BGR on the health of workers responsible for applying the repellent to forest seedlings. The District Manager stated in his letter that "[w]e intend to complete this investigation prior to any decision \* \* \* to use or dispose of our BGR, which we have in a secure storage area." Further, the letter noted that "[a]s soon as we receive our remaining information on this matter we will make our findings available to the public."

Subsequently, appellant filed a notice of appeal to this Board, stating that she appealed "the decision to purchase a large quantity of the Big Game Repellent Pesticide Deer Away prior to the close of the public comment period for the Environmental Assessment No. ORO90-93-5 for the McKenzie Resource Area of the Eugene District of the Bureau of Land Management in Oregon." In appellant's statement of reasons for appeal (SOR), she requested relief in the form of a

guarantee from the Bureau of Land Management that the BLM will, from this time on, issue environmental documents, decision documents, and requests for input from the public on proposed actions subject to public input, well in advance of actual [commitment] of funds, letting of contracts, or actual purchases of supplies that command implementation of the proposed action, allowing sufficient time for the public to review, comment, protest, stay and appeal the action if the public deems it appropriate or necessary to do so.

Additionally, appellant's SOR seeks

an order from the Interior Board of Land Appeals mandating that the Bureau of Land Management, from this time henceforth, make actual purchases for supplies, let contracts for services, and otherwise commit funds to implement actions subject to the review of the public only after allowing sufficient time for public review, protests, requests for stays and appeals.

Appellant asserts that BLM's purchase of BGR prior to the end of the public comment period for EA No. ORO-90-93-5 (McKenzie Resource Area of the Eugene District) "demonstrates [that] the decision to use the pesticide had

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<sup>4/</sup> The letter explained that BLM was initially concerned regarding the possible presence of formaldehyde in levels exceeding occupational exposure

already been made without including the public in the decision-making process."

[1] To the extent appellant is protesting the prior purchase of the BGR itself, the protest would have to be dismissed as untimely since a protest by definition relates to actions proposed to be taken. 43 CFR 4.450-2. 5/ A protest of any action that is not proposed to be taken, but which has already occurred, is properly dismissed as untimely. Lazaro Mendieta, 126 IBLA 394, 397 (1993); Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 318, 92 I.D. 37, 41 (1985). Further, since appellant has failed to explain how the mere purchase of BGR adversely affects any legally cognizable interest, her appeal would be subject to dismissal on that basis as well. See, e.g. Mark S. Altman, 93 IBLA 265 (1986); Save Our Ecosystems, Inc., 85 IBLA 300 (1985).

To the extent that appellant's protest may be construed as a protest of the proposed application of BGR as related in the referenced EA's, the record discloses that at the time of the appeal BLM had decided to suspend the use of BGR pending further study. In the absence of a decision to apply BGR, there is no decision to appeal and any appeal must be dismissed as premature and/or moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur.

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James L. Burski  
Administrative Judge

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fn. 4 (continued)

limits. Subsequently, the manufacturer informed BLM that BGR does not contain formaldehyde. However, at the time of the letter responding to appellant's protest, BLM was in the process of assessing concerns regarding the chemical ethyl acrylate. 5/ "[A]ny objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." 43 CFR 4.450-2.

